

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 233

NAOMI PETTY, ADMINISTRATRIX OF THE
ESTATE OF FAYE R. PETTY, DECEASED,
PETITIONER,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
A CORPORATION,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 15,878.

Civil.

NAOMI PETTY, Administratrix of the Estate of Faye R.
Petty, Deceased, Appellant,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, SOUTHEASTERN DIVISION

STIPULATION AS TO RECORD ON APPEAL

It is stipulated by and between the parties hereto that the
record on appeal shall consist of the following:

- (1) Complaint.
- (2) Motion to Dismiss for improper venue and Motion
to Dismiss account immunity for tort action with
annexed affidavit marked Exhibit "A".
- (3) Evidence at hearing on defendant's (appellee's) Mo-
tion to Dismiss.
- (4) Memorandum opinion and order of the District
Judge, dated July 12, 1957, dismissing Complaint.
- (5) Notice of Appeal.
- (6) Relevant docket entries in the United States District
Court.

(Signed) Douglas MacLeod, Attorney for Appellant.

Ward and Reeves, Attorneys for Appellee.

By (Signed) James M. Reeves, One of Said Attor-
neys.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 10990 (2) Harper, J.

NAOMI PETTY, Administratrix of the Estate of Faye R.
Petty, Deceased, Plaintiff,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation,
Defendant.

COMPLAINT—Filed December 7, 1956

Count I.

I.

Plaintiff Naomi Petty, was by order of the County Court of Lake County, Tennessee, dated July 13, 1956, appointed Administratrix of the Estate of Faye Petty, deceased, a married man and a resident of Tiptonville, Tennessee, who died on July 8, 1956, leaving surviving him a widow, Naomi Petty, and a minor child, Terry Gene Petty, a boy aged nine, and no others.

II.

Plaintiff seeks to enforce on behalf of herself as a widow, and on behalf of her minor son any rights of action for death, which may exist in their favor under and by virtue of 46 U. S. Code 688, commonly known as the Jones Act.

III.

The deceased Faye Petty was at the time of the things and matters complained of herein, a seaman and a member [fol. 3] of the crew of the motor vessel or tug ELINOR D. and the ferry barge HELM which was in its tow.

IV.

Defendant Tennessee-Missouri Bridge Commission is, and at the time of the things and matters complained of herein was, a body corporate and politic duly organized and existing under law, having been created by joint action of the legislatures of the States of Tennessee and Missouri under authority of an Act of Congress known as the General Bridge Act of 1946 in the year 1949, with, among others, the power to sue and be sued.

V.

The defendant at all times herein mentioned owned and operated in interstate commerce the Motor Vessel ELINOR D together with its ferry barge HELM as a ferry for the use and convenience of the public for a charge, traveling between the States of Missouri and Tennessee, across the Mississippi River, with one terminus of its route in the vicinity of Tiptonville, Tennessee, and the other in the vicinity of Portageville, Missouri.

VI.

On or about July 8, 1956, the deceased, while in the course of his employment as a deck-hand on the above named ferry, tug and barge, and while the same was en route across the Mississippi River from its terminal point in Missouri to its terminal point in Tennessee, at a point in or near the navigation channel, was caused to be trapped in the pilot house of the sinking tug and to be drowned, as a result of a collision between the aforesaid ferry and the Motor Vessel CAPE ZEPHYR, and its tow of barges, which were proceeding upstream, all due in whole or in part to the negligence of the defendant, its officers, agents and employees.

VII.

The deceased Faye Petty was at the time of the casualty aforementioned, thirty-one (31) years of age with a life [fol. 4] expectancy of 34.63 years according to the American Experience Table, and in good health, earning approxi-

mately \$3500.00 per year; while the widow, Naomi Petty, was at the time of the casualty, twenty-seven (27) years of age, with a life expectancy exceeding that of her husband's at the time of his death, and their only minor child was nine (9) years of age on November 25, following the casualty; both widow and minor child were totally dependent upon deceased and are now in a destitute condition as a result of his death.

VIII.

The widow and the minor child have suffered grave pecuniary loss as a result of the death of Faye Petty in the total amount of Ninety Nine Thousand Nine Hundred Ninety Nine Dollars and Ninety Nine Cents (\$99,999.99).

Wherefore, plaintiff demands judgment against the defendant under this Count I of her Complaint in the amount of Ninety Nine Thousand Nine Hundred Ninety Nine Dollars and Ninety Nine Cents (\$99,999.99), together with her costs.

Plaintiff Demands Trial by Jury of Count I.

Count II.

IX.

Plaintiff realleges all the facts set out in Count I herein and seeking to enforce on behalf of the estate all rights existing in favor of the deceased Faye Petty, against the defendant for personal injuries including conscious pain and suffering arising out of the casualty in question, under and by virtue of the Jones Act, previously referred to, alleges further that by virtue of the premises the deceased Faye Petty, as a result of being trapped inside the sinking vessel, carried on a desperate struggle to free himself and to escape prior to being over-come by water, and in the course of his activity he suffered great mental pain and anguish all to his damage in the sum of Nine Thousand Nine Hundred Ninety Nine (sic) and Ninety Nine Cents (\$9,999.99).

[fol. 5] Wherefore, plaintiff demands judgment against the defendant under this Count II of her Complaint in the

further sum of Nine Thousand Nine Hundred Ninety Nine Dollars and Ninety Nine Cents (\$9,999.99), together with her costs.

Plaintiff Demands Trial by Jury of Count II.

(Signed) Fred Robertson, 221 Church Street, Tiptonville, Tennessee,

(Signed) W. M. Miles for Miles and Miles, Old National Bank Building, Union City, Tennessee,

(Signed) Douglas MacLead, 722 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title Omitted]

**Motion to Dismiss for Improper Venue and Motion to
Dismiss Account Immunity for Tort Action—
Filed December 28, 1956**

MOTION TO DISMISS FOR IMPROPER VENUE

Comes now the defendant in the above-entitled cause and moves the Court to dismiss this action and to quash [fol. 6] the Summons and Return of the Marshal thereon, the jurisdiction of this Court being invoked solely on the ground that the action arises under the Constitution and Laws of the United States and the defendant being a body politic created by the Legislatures of Tennessee and Missouri, the Act of the Missouri Legislature being contained in Sections 234.360 to 234.420, inclusive, R. S. Mo. 1949, and the Acts of the Tennessee Legislature being contained in Chapters 167 and 168 of the Public Acts of 1949, and approved by an Act of the Congress of the United States, being public Law 411 of the 81st Congress, Chapter 758, for the following reasons, to-wit:

1—Because under the Acts of the Legislatures and Congress aforesaid the defendant is not a resident of this Division of this Court, and the defendant has never done business and is not authorized to carry on its business in this Division of this Court, but defendant is a resident and is carrying on its business as authorized by the Acts aforesaid within the jurisdiction of the Southeastern Division of this Court, and consequently the venue of this cause is not in this Division but the same is in the Southeastern Division of the Eastern Judicial District of Missouri.

2—Because the Business office and the Headquarters of the defendant is located in Caruthersville, Pemiscot County, Missouri, outside of the jurisdiction of this Division of this Court, and being located in the Southeastern Division of the Eastern Judicial District of Missouri, all of which is more definitely shown by the affidavit of J. F. Patterson, Secretary and General Manager of defendant, attached hereto and marked Exhibit "A".

3—Because the Summons was issued out of this Division of this Court and was served on E. L. Spence, Chairman of defendant, in Dunklin County, Missouri, which is outside of this Division of this Court, but is within the jurisdiction of the Southeastern Division of this Court.

4—Because all of the Commissioners of the defendant provided by the Acts of the Legislatures and the Act of Congress aforesaid are residents of Pemiscot County, [fol. 7] Missouri, or counties adjacent thereto, and Dyer County, Tennessee, or counties adjacent thereto, all being citizens and residents of Missouri and Tennessee outside of the jurisdiction of this Division of this Court.

Wherefore, defendant prays that this cause be dismissed and that the Summons and Return of the Marshal thereon be quashed on account of improper venue.

MOTION TO DISMISS ACCOUNT IMMUNITY FOR TORT ACTION

In the event the above and foregoing motion is denied by the Court, then in the alternative, the defendant respect-

fully shows to the Court that it is an immediate agency and arm of the sovereign states of Tennessee and Missouri and of the Federal Government by reason of the Acts of the Legislatures and the Act of Congress set up and pleaded in defendant's motion to dismiss and to quash to Summons and Return of the Marshal thereon hereinabove pleaded and set out, reference to which is hereby made and incorporated herein as a part of this motion, and by reason of which this defendant is a creature of the States of Tennessee and Missouri and of the United States, whose sole powers and duties are to plan, construct, maintain and operate a bridge at or near Caruthersville and ferries across the Mississippi River within a radius of 25 miles of Caruthersville, Missouri, as an agency of Tennessee, Missouri and the United States, and pay for the same by tolls, and the title thereto to become vested in the States of Tennessee and Missouri when the costs thereof have been paid, and, by reason of which facts this defendant is not liable to the plaintiff for the matters and things set up and pleaded in the Complaint for the following reasons, to-wit:

1—Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.

2—Because this action, is in substance and effect one against the states of Tennessee and Missouri, without consent, over which neither the judicial power of the [fol. 8] United States or the States of Tennessee or Missouri extends.

3—Because this is a suit against an agency created by the sovereign states of Tennessee and Missouri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class.

4—Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action.

Wherefore, defendant moves that plaintiff's Complaint be dismissed.

Ward & Reeves, Caruthersville, Missouri, Attorneys
for Defendant,
By: (Signed) James M. Reeves, One of Said Attor-
neys.

Certificate of service (omitted in printing).

[fol. 9]

EXHIBIT "A"—AFFIDAVIT

COUNTY OF PEMISCOT)

) ss

STATE OF MISSOURI)

J. F. Patterson, being duly sworn, upon his oath says that he is Secretary and General Manager of Tennessee-Missouri Bridge Commission, and in support of defendant's motions to dismiss upon his oath deposes and says as follows:

1—That the Tennessee-Missouri Bridge Commission is a body politic duly organized and existing for the uses and purposes authorized by the Acts of the Legislatures of Tennessee and Missouri and approved by an Act of Congress of the United States as set up and pleaded in said motions to dismiss.

2—That the names and addresses of the members of said Tennessee-Missouri Bridge Commission are as follows: Dr. E. L. Spence of Kennett, M. R. Rowland, S. P. Reynolds and Gordon Wright of Carutherville, and Tom Ferg Hunter of New Madrid, all in the State of Missouri, and Jones Greer, Vernon Forcum and James Lanier of Dyersburg, and Miller J. Everett of Obion and Robert Sweatt of Ridgely, all in the State of Tennessee.

3—That the names and addresses of the officers of Tennessee-Missouri Bridge Commission are as follows:
[fol. 10] E. L. Spence, Chairman, Miller J. Everett, Vice-

Chairman, Jones Greer, Treasurer, and J. F. Patterson of Caruthersville, Missouri, Secretary and General Manager.

4—That at a Meeting of the Commissioners of Tennessee-Missouri Bridge Commission held at the Majestic Hotel in Caruthersville, Missouri, on November 4, 1949, it was unanimously ordered that the Business Office and Headquarters of said Tennessee-Missouri Bridge Commission be located and set up and maintained at Caruthersville, Missouri, which was accordingly done, and said Business Office and Headquarters of said Commission has at all times since been located in Caruthersville, Missouri.

5—That after the organization of the Tennessee-Missouri Bridge Commission a contract was made and entered into by and between said Commission and the Secretary of the Treasury of the United States which defined the status of said Tennessee-Missouri Bridge Commission as a governmental agency and that the interest income on all of the bonds which might be issued by said Commission would be exempt from Federal Income Taxes.

6—That the states of Tennessee and Missouri and the United States allocated the sum of \$100,000.00 to said Tennessee-Missouri Bridge Commission for the uses and purposes enjoined upon said Commission by the Acts of the Legislatures aforesaid and the Act of Congress, and approximately \$48,000.00 of said allocation has been expended under the orders of said Commission.

7—That thereafter in pursuance to the powers and duties enjoined upon said Commission by the Legislative Acts aforesaid said Commission purchased and acquired title to what is known as the Tiptonville Ferry which operates a ferry across the Mississippi River between Tennessee and Missouri and being the instrumentality upon which Faye Petty, deceased, lost his life while employed by said Tennessee-Missouri Bridge Commission, and said Commission by resolution duly passed and [fol. 11] approved issued its revenue tax free bonds in

the amount of \$200,000.00 bearing interest at the rate of 5% per annum for the purpose of paying the purchase price of said ferry, and the sum of \$180,000.00 of said bonds are still outstanding and unpaid, and all of the ferry property and the income therefrom was pledged to secure the payment of said revenue bonds and the interest accruing thereon.

8—That said Tennessee-Missouri Bridge Commission has never at any time transacted any business except that which is authorized by the Legislative Acts aforesaid, and has not at any time engaged in any business within the jurisdiction of the St. Louis Division of the United States District Court, and said Commission has never at any time maintained any Business Office or Headquarters outside of the City of Caruthersville, Missouri.

Further affiant sayeth not.

(Signed) J. F. Patterson.

Subscribed and sworn to before me this 27th day of December, 1956. My term expires October 15, 1960.

(Signed) Betty Lou Craven,
Notary Public.

(Seal)

IN UNITED STATES DISTRICT COURT

EVIDENCE AT HEARING ON DEFENDANT'S (APPELLANT'S)
MOTION TO DISMISS HELD AT CAPE GIRARDEAU,
MISSOURI, MARCH 2, 1957

Roy W. Harper, District Judge, presiding.

APPEARANCES

Present for plaintiff (appellant) Douglas MacLeod, St. Louis, Missouri, W. M. Miles and Charles Miles of Union City, Tennessee, and Fred Robertson of Tiptonville, Tennessee.

Present for Defendant (Appellee), James M. Reeves of Ward and Reeves, Caruthersville, Missouri.

[fol. 12] NOTES RE EVIDENCE INTRODUCED BY DEFENDANT

Defendant introduced the statutes of Missouri and Tennessee setting up the defendant Commission; to-wit, Sections 234.360 to 234.420 of the Statutes of Missouri 1949 and House Bill #980, Chapter 167, Public Acts of 1949 of the Tennessee Legislature and House Bill #981, Chapter 168 of the Public Acts of 1949 of the Tennessee Legislature, also the Act of Congress approving the compact between Tennessee and Missouri which is Public Law 411, Chapter 758, Acts of the 81st Congress (House Resolution 6109).

The defendant (appellee) also presented testimony of J. F. Patterson, Secretary of the defendant Commission and documentary material tending to prove the matters of fact set out in its affidavit marked Exhibit "A", annexed to its Motion, included elsewhere in this Record, and incorporated herein by reference.

No evidence was presented by the plaintiff (appellant).

(No oral arguments were presented and the matter was submitted upon memoranda.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S 57 C 1

NAOMI PETTY, Administratrix of the Estate of
Faye R. Petty, Deceased, Plaintiff,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation, Defendant.

Harper, Judge.

APPEARANCES

For Plaintiff: Mr. Douglas MacLeod, 722 Chestnut Street,
St. Louis 1, Missouri.

[fol. 13] For Defendant: Mr. James M. Reeves, of Ward & Reeves, Caruthersville, Missouri.

MEMORANDUM OPINION AND ORDER—July 12, 1957

This matter is before the court on defendant's motion to dismiss on the basis that the defendant is an immediate agency and arm of the sovereign states of Tennessee and Missouri and of the Federal government, and is immune from tort actions.

Similar motions to dismiss are often treated as a motion for summary judgment. *Suckow Borax Mines Consolidated v. Borax Consolidated*, 185 F. 2d 196.

The facts with respect to the motion are undisputed and so will not be discussed by the court in detail. This is an action by an administratrix to recover for the wrongful death of the deceased under the Jones Act, Sec. 688, 46 U. S. C. A.

The deceased was a member of the crew of a ferry vessel which was owned and operated by the defendant. The vessel's operation included transporting automobiles across the Mississippi River to and from Tennessee and Missouri. Defendant is organized and existing under the laws of Tennessee and Missouri and under the authority of Congress. The deceased was a deck hand on the ferry vessel. As the ferry vessel was en route across the river a collision occurred with another vessel and defendant was trapped in the pilot house and drowned when the ferry vessel sank.

The law is well settled that the sovereign cannot be sued in its own courts or any other court without its consent and permission. The question of whether a particular suit is one against the sovereign is not to be determined solely by reference to the nominal parties to the suit, but is dependent on the nature and effect of the suit. Here the suit is one about which the subject matter is an interest of value of a material sense to both states. A judgment against the defendant would operate to affect directly the two sovereigns, and so to determine the matter here we must turn to the question of whether or not consent and permission were given for parties in tort action to sue the defendant. The compact creating the defendant commission [fol. 14] in part reads as follows: "To contract, to sue and

be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property."

This clearly gives the defendant the power to sue and to be sued, but such does not waive immunity from liability for actions in tort. No consent has been given by the defendant for tort actions. Defendant was given no authority to pay judgments, and if a judgment were rendered against the defendant in this case the two states and the Federal government would be responsible. The operation of the defendant is governmental in nature.

To properly determine the effect of the provision, "to contract, to sue and to be sued in its own name", we must ascertain the intentions of the lawmakers, and in doing so we must refer to the doctrine of "ejusdem generis". The "ejusdem generis" rule is that, where statute contains general words only, such general words are to receive a general construction but where it enumerates particular classes of things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified. *Hammett v. Kansas City*, 173 S. W. 2d 70.

Following this rule, the words "to sue and to be sued" used in the compact apply only to contracts and did not have the effect of waiving immunity from tort actions.

The motion to dismiss will be sustained and cause dismissed.

(Signed) Roy W. Harper, U. S. District Judge.

July 12, 1957.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed August 9, 1957

Notice is hereby given that Naomi Petty, Administratrix of the Estate of Faye R. Petty, deceased, Plaintiff above named, hereby appeals to the United States Court of Ap-

peals for the Eighth Circuit from the Order dismissing the within action entered herein on July 12, 1957.

Fred Robertson, Miles and Miles,
(Signed) Douglas MacLeod, 722 Chestnut Street,
St. Louis, Missouri, Attorneys for Plaintiff-Appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOCKET ENTRIES

December 7, 1956—Complaint with demand for jury trial filed and summons issued.

[fol. 16]

December 13, 1956—Marshal's Return filed. Summons, etc., executed on Ten-Mo Bridge Commission (With Dr. E. L. Spence) 12/11/56.

December 28, 1956—Defendant's Motions to Dismiss for Improper Venue and to Dismiss Account Immunity filed.

January 2, 1957—Defendant's Motions to Dismiss for Improper Venue and to Dismiss Account Immunity and entire file delivered to Judge Harper.

January 8, 1957—Order filed sustaining Motion of Defendant to Transfer for Improper Venue from the Eastern to the South-eastern Division of the District and directing the clerk of this Court to transfer all files together with attached copy of this Order and the Docket Entries in this proceeding to the Clerk of the aforesaid Court at Cape Girardeau, Missouri. Notice of Order and Transfer of Cause mailed to attorneys of record herein.

SOUTHEASTERN DIVISION

- January 10, 1957—Attested copy of order of Judge Roy W. Harper, transferring cause from the Eastern Division to the Southeastern Division of District Court together with docket entries, etc., filed. Jury trial demanded.
- March 2, 1957—Defendant's Motion to Dismiss Account of Immunity for Tort Action heard; defendant granted ten days to submit brief; plaintiff ten days thereafter to submit answering brief; and defendant five days thereafter in which to submit reply brief; upon receipt of all briefs motion will be taken as submitted.
- [fol. 17]
July 12, 1957—Memorandum Opinion and Order of Judge Roy W. Harper sustaining Motion to Dismiss and Dismissing Cause filed. Notice mailed by the Court to Douglas MacLeod, attorney for plaintiff, and James M. Reeves, attorney for defendant.
- August 9, 1957—Plaintiff's Notice of Appeal to U. S. Court of Appeals, Eighth Circuit, from Order dismissing action entered July 12, 1957, filed and copy of Notice forwarded to Ward and Reeves, attorneys for defendant. Plaintiff's cost bond on Appeal, sum of \$250 filed.
- August 12, 1957—Plaintiff's cost bond in the sum of \$250 approved.
- September 9, 1957—Original Notice of Appeal and two certified copies of the Docket Entries delivered to the U. S. Court of Appeals, Eighth Circuit.

[fol. 18]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,878

Appeal from the United States District Court
for the Eastern District of Missouri

NAOMI PETTY, Administratrix of the Estate of FAYE R.
PETTY, Deceased, Appellant,

v.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation,
Appellee.

Douglas MacLeod (Fred Robertson and Miles & Miles
were with him on the brief) for Appellant.

James M. Reeves (Ward & Reeves was with him on the
brief) for Appellee.

Before Gardner, Chief Judge, and Johnsen and Van Oosterhout, Circuit Judges.

OPINION—May 1, 1958

VAN OOSTERHOUT, Circuit Judge.

Plaintiff-administratrix has appealed from final order dismissing her complaint for damages for wrongful death of her decedent. Plaintiff, as administratrix of the estate [fol. 19] of her deceased husband, in her complaint asserted that her deceased husband, while employed as a seaman upon a ferry boat operated by the defendant across the Mississippi River between Tiptonville, Tennessee, and Portageville, Missouri, met his death when trapped in the pilot house of the ferry boat as it sank, as the result of a collision with another boat; that her husband's death was caused by the negligence of the defendant; and that recovery of damages is authorized by the Jones Act, 46 U.S.C.A., § 688.

Defendant filed a motion to dismiss, based upon the following grounds:

"1—Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.

"2—Because this action is in substance and effect one against the States of Tennessee and Missouri, without consent, over which neither the judicial power of the United States or the States of Tennessee or Missouri extends.

"3—Because this is a suit against an agency created by the sovereign States of Tennessee and Missouri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class,

"4—Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action."

The court in its decision states that the motion may be treated as a motion for summary judgment.

The trial court sustained the defendant's motion and dismissed the complaint upon the basis that the suit [fol. 20] against the defendant was in effect a suit against the States of Tennessee and Missouri, that the defense of sovereign immunity was available to said States, and that such defense had not been waived. The appeal challenges the validity of this determination.

Plaintiff in her brief states that defendant's claim of sovereign immunity must be denied for each of the following reasons: (1) defendant is a separate entity from the States of Tennessee and Missouri; (2) the States have waived sovereign immunity; (3) the States, by empowering the Commission to engage in maritime commerce and interstate commerce, "subordinated themselves and it to the Federal Government's power to regulate interstate

commerce and its power over matters maritime, and all laws enacted to implement these powers, including the Jones Act."

The pertinent facts relative to the creation and operation of the Bridge Commission may be summarized. The Bridge Commission "is a "body corporate and politic." The Commission was created in 1949 pursuant to the General Bridge Act of 1946, 33 U.S.C.A., §§ 525-533, by joint action of the legislatures of Tennessee and Missouri (Chapters 167 and 168 of the Public Acts of 1949 of the Tennessee Legislature, and Revised Statutes of Missouri, Sections 234.360-234.420) and by special act of Congress (Public Law 411, 81st Congress, Chapter 758). Congressional approval was required by Article I, Section 10, Clause 3 of the Constitution of the United States, which provides, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State" The terms of the interstate compact are set out in full in each of the state acts and in the congressional act of approval. The main function of the [fol. 21] Commission is to plan, construct, maintain, and operate an interstate bridge near Caruthersville, Missouri, with authority granted to purchase and operate ferries across the river within 25 miles of the bridge site.

We now consider the question of whether the Commission is an entity separate and apart from the States of Tennessee and Missouri.

In *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, the action was brought against various state officials who constituted the Department of Treasury. The action was dismissed on the basis of sovereign immunity. The Court, in support of its determination that the suit was one against the state, says (p. 464):

" . . . We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. . . . And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. . . . "

In *Kansas City Bridge Co. v. Alabama State Bridge Corp.*, 5 Cir., 59 F.2d 48, the action against the bridge company was held to be one against the state, the court stating (pp. 49-50):

"It is clear that the whole purpose of the act was to erect bridges essential to the highway system, to pay for them with tolls, and then to make them free for the use of the public. It is well settled that the construction of public roads and bridges is a governmental function. * * * The state may either perform this function in its own name or through its public officers or one of its governmental agencies. * * * The Alabama Bridge Corporation was but an agency or instrumentality through which the state acted in causing its public bridges to be constructed. It was not a private corporation in any sense of the word, but state officials, who might as well have been designated a board or commission, were ex officio members, and the only members, of it. * * * In the nature of things the state had to choose some such agency in order to effectuate its purpose. * * *"

In *Cargile v. New York Trust Co.*, 8 Cir., 67 F.2d 585, the plaintiff brought an action against the members of the Highway Commission of the State of Arkansas, seeking to have a receiver appointed to take charge of a toll bridge. The action was held to be in effect an action against the State of Arkansas and was dismissed for want of jurisdiction. *Copper S. S. Co. v. State of Michigan*, 6 Cir., 194 F.2d 465, involved a suit for damages caused by a ferry boat operated across the Mackinac Straits by the State Highway Department. The action was held to be one against the state and was dismissed.

In our present case, it is apparent that the purpose of the States in entering into the compact and in carrying out the authorized activity was to perform their respective governmental obligations to furnish the public with necessary highways and bridges. The defendant Commission was the agency or instrument of the two States and not an entity separate and apart from the States. The Commis-

sion could issue no stock. It was controlled by state officials appointed by the respective governors with senate confirmation. Commission action could be authorized only upon a majority vote of the commissioners from each State. Veto power was reserved to the governors. The Commission's authorized bonds were granted exemption from income taxation. Its revenue from tolls could only be used for reasonable operating expenses and for payment of its bonds and interest, and when the indebtedness was paid the bridge was to belong to the two States and to be operated free of tolls. The Commission afforded no opportunity for realization of private profits to anyone. It had no right to levy taxes. Its tolls were pledged exclusively for operating expenses and bond payments. Aside from the tolls, its only sources of money were the creating States and the Federal Government. It is apparent that a judgment against the Commission and a seizure of the ferry would adversely affect the participating States in the performance of their duty of providing a means of crossing the river.

Plaintiff urges that inasmuch as defendant is a creature of two States, it must be a separate entity. We see no insuperable obstacle to several states using the same instrumentality to carry out a common governmental obligation. As heretofore pointed out, the Constitution of the United States specifically provides for congressional approval of compacts between states. The approval of the compact by Congress at least lends support to the propriety of the States carrying out the project here involved jointly.

Justice Frankfurter and Dean Landis, in an article in 34 Yale Law Journal 685, discuss the compact clause of the Constitution, and in an appendix set out many instances in which compacts have been utilized. The effectiveness of the compact in solving many interstate problems is pointed out. The Port of New York Authority is an example of an interstate compact. This authority was created by New York and New Jersey with the approval of Congress. It performs harbor duties and provides bridges and tunnels connecting the two States. In *Howell v. Port of New York Authority*, D.C. N.J., 34 F.Supp. 797,

[fol. 24] the compact creating the Authority was discussed. In dismissing the action, the court states (p. 801):

"The Port Authority, a bi-state corporation * * * is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent. * * *"

To the same effect see *Rao v. Port of New York Authority*, E.D. N.Y., 122 F.Supp. 595, affd. 2d Cir., 222 F.2d 362.

We are satisfied that the defendant Commission is an instrumentality of both Tennessee and Missouri and that it is not an entity separate and distinct from the States.

Plaintiff next contends that the States have waived any immunity they might have because of the provision contained in the compact reading as follows:

"[The Commission] shall have the following powers and duties:

* "3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property * * * ."

Some support for plaintiff's contention that there is a tendency to give statutes authorizing suits a liberal construction is found in cases involving corporations created by the Federal Government and in Tort Claims Act suits. However, no such tendency is apparent in cases involving the waiver of sovereign immunity on the part of states. *Porto Rico v. Rosaly*, 227 U.S. 270; *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47; *Ford Motor Co. v. Department of Treasury of Indiana*, supra; *Copper S. S. Co. v. State of Michigan*, supra; *Pacific Fruit & Produce Co. v. Oregon Liquor Control Commission*, D. C. Ore., 41 F.Supp. 175.

[fol. 25] In *Porto Rico v. Rosaly*, supra, the issue was whether the sovereign immunity defense was available to Porto Rico. It was contended that the power granted Porto Rico to sue and be sued deprived it of such immunity. The

Court conceded that such words standing alone could be so construed, but stated that when they are considered in context they could not be interpreted in such a way as to deprive Porto Rico of such a vital right as sovereign immunity. In the *Read* case, supra, the state had authorized suit to recover taxes illegally collected. The statute was construed to limit the waiver to suits in the state court. The Court states (pp. 53-54):

"The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures. . . ."

The Supreme Court has stated that administrative constructions by a state of its statutes of consent influence its conclusions. *Great Northern Life Ins. Co. v. Read*, supra; *Ford Motor Co. v. Department of Treasury of Indiana*, supra.

The Supreme Court of Missouri in *Todd v. Curators of University of Missouri*, — Mo. —, 147 S.W.2d 1063, 1064, states:

"A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. . . . But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity [fol. 26] from liability for the torts of the officers or agents of the state is quite another thing.' *Bush v. Highway Commission*, 329 Mo. 843, loc. cit. 849, 46 S.W.2d 854, loc. cit. 856. . . ."

In Tennessee, statutes permitting suits against the State are strictly construed. *State v. Cook*, — Tenn. —, 106 S.W.2d 858; *Hill v. Beeler*, — Tenn. —, 286 S.W.2d 868.

An application of the law above stated to the undisputed facts before us leads us to the conclusion that the language used in the compact, when considered in context, can not be construed to constitute a waiver of sovereign immunity as to tort liability by the States of Tennessee and Missouri. The words "to sue and be sued" immediately follow the words "to contract." There is no express waiver of tort liability, nor can such a waiver be fairly implied. It is reasonable to assume that the drafters of the compact had in mind the interpretation of their courts to the effect that the grant of a right to sue and be sued did not include a waiver of immunity as to tort liability.

We have determined that the suit was in effect a suit against the States of Tennessee and Missouri, and that neither of said States has waived its sovereign immunity as to tort liability. Under such circumstances, the trial court and this court are without jurisdiction to entertain this action.

Defendant's motion asserts that the action is in effect an action against the States, and that the court has no jurisdiction over the defendant or the subject matter of the action. While the bar of the Eleventh Amendment to the Constitution of the United States is not specifically asserted, we are inclined to think that the court's jurisdiction was sufficiently challenged. In any event, we believe [fol. 27] that we are obligated to determine whether the Eleventh Amendment deprives this court of jurisdiction.

In *Ford Motor Co. v. Department of Treasury of Indiana*, supra, the Supreme Court states (p. 467):

" . . . The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."

The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

It has uniformly been held that federal judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or laws of the United States. *Missouri v. Fiske*, 290 U.S. 18; *Great Northern Life Ins. Co. v. Read*, supra; *Cargile v. New York Trust Co.*, supra. In the case last cited this court applies the rule above stated and cites many cases supporting it.

The complaint shows the plaintiff to be a resident of Tennessee. The authorities just cited would bar a tort action against Missouri. The Amendment does not by its terms bar a citizen from suing his own state. However, the Supreme Court has squarely held that a state can not be sued without its consent in a federal court by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1. In *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304, footnote 13, the decision in *Hans v. Louisiana* is recognized as properly stating the law.

[fol. 28] Plaintiff contends that jurisdiction exists because of Article 3, Section 2 of the Constitution of the United States providing that judicial power shall extend to all cases in admiralty and maritime jurisdiction. This is the same section of the Constitution which confers jurisdiction over cases arising under the Constitution and laws of the United States. The Court, in the cases heretofore cited, has held that the provision granting jurisdiction over cases arising under the laws of the United States does not give a federal court jurisdiction in a suit by a citizen against a state, and no reason is apparent why the portion of the same section of the Constitution granting admiralty jurisdiction should receive any different treatment.

In *Ex Parte State of New York*, No. 1, 256 U.S. 490, the Court held that a state could not be sued in admiralty for maritime tort without its consent. The Court fully discusses the reasons for upholding state immunity, and distinguishes *Workman v. New York City*, 179 U.S. 552,

relied upon by the plaintiff. Among other things, the Court states (pp. 498, 502-503):

" * * * In *Hans v. Louisiana*, *supra* (p. 15), the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own State in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not."

"There is no substance in the contention that this result enables the State of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman v. New York City*, 179 U.S. 552, 557-560; * * * [fol. 29] The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. * * * It is not inconsistent in principle to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction."

In *Ex Parte State of New York*, No. 2, 256 U.S. 503, it was held that a ship owned by New York and used for governmental purposes could not be seized by admiralty process in rem in an action for damages caused by the negligent operation of the ship.

Plaintiff contends that the States are subject to federal laws regulating interstate commerce and maritime matters, and that the Jones Act was enacted pursuant to such powers.

We find nothing in the Jones Act which shows any congressional intention to make its provisions applicable when either the State or Federal Government is the employer. In the comment found in Cumulative Supplement

46 U.S.C.A. 57, 61, it is stated that the Jones Act applies only to vessels of private ownership or operation. The Federal Government has power to regulate interstate commerce and maritime activities. However, such power, is not broad enough to authorize any federal legislation which would impair the constitutional immunity granted states from suits by citizens against such states in federal courts. If the Jones Act were construed to impose tort liability upon states for injuries to its seaman employees, there is grave danger that such a provision would conflict with the Eleventh Amendment. Ambiguous statutes are generally construed in such a way as to preserve their constitutionality.

United States v. California, 297 U.S. 175, relied upon by the plaintiff, is not in conflict with the result we reach. The action in that case was brought by the United States and not by an individual, and hence no conflict with the Eleventh Amendment arises in that case.

We conclude that the trial court, by reason of the provisions of the Constitution, and particularly the Eleventh Amendment, had no jurisdiction of this suit, brought in effect against the States of Tennessee and Missouri. The trial court properly dismissed the action for want of jurisdiction.

Affirmed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15878—September Term, 1957.

NAOMI PETTY, Administratrix of the Estate of FAYE R.
PETTY, Deceased, Appellant,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a corporation.

JUDGMENT—May 1, 1958

Appeal from the United States District Court
for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

[fol. 32] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 33]

SUPREME COURT OF THE UNITED STATES

No. 233, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.